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No. 86-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN P. MADDEN, CHARLES J. OSWALD, and RICHARD W. KURRE, Individually and as Representatives of a Class of Persons,

Petitioners,

vs.

JEFFREY M. GLUCK, DEBRA McALEAR GLUCK and LANDMARK ST. LOUIS BANK, N.A.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT LANDMARK ST. LOUIS BANK IN OPPOSITION

DAVID W. HARLAN
(Counsel of Record)
THOMAS P. HOHENSTEIN
GALLOP, JOHNSON & NEUMAN
101 South Hanley Road,
Suite 1600
St. Louis, Missouri 63105
(314) 862-1200

Attorney for Respondent, Landmark St. Louis Bank

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners stated a cause of action under RICO where they sought to characterize a single, isolated fraudulent episode as a "pattern" by alleging each use of the mails or wires in furtherance of that single episode as separately chargeable fraudulent acts.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1) is reported at 815 F.2d 1163 (8th Cir. 1987). The opinion of the District Court (Pet. App. A-6) is reported at 636 F.Supp. 463 (E.D.Mo. 1986).

JURISDICTION

The Court of Appeals entered judgment on February 11, 1986. The Court denied the Petition for rehearing on March 9,

1987. The Petition for writ of certiorari was filed on June 3, 1987. The court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Respondent Landmark St. Louis Bank ("Landmark")[1], with the exception of the following clarifying statements, adopts the statement of the case set forth by Petitioners together with the factual statements set forth in the opinions of the Court of Appeals and the District Court (Pet. at 4-5; Pet. App. at A-2, A-6 to A-7).

The complaint alleges that the Glucks, while serving as officers, directors and publishers of the St. Louis Globe-Democrat, Inc. (the "Globe"), devised a scheme to defraud Globe employees such as plaintiffs and trade creditors of goods and services by creating an illusion of solvency. The Glucks are also alleged to have diverted Globe assets for personal enrichment. The Glucks accomplished the scheme by paying creditors and employees for goods and services with Globe checks drawn on accounts with insufficient funds maintained at Landmark. The Glucks also furthered the scheme through the alleged falsification of the Globe's financial statements and accounting books and records, and delivering the same to creditors.

Petitioners allege that the Gluck's objective after diverting the Globe's assets, was "to sell their Globe shares for the maximum price obtainable". The alleged scheme was to be fully accomplished and terminated upon either the sale by the Glucks of

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[1] Landmark St. Louis Bank has, since the filing of the complaint, been merged with other banks, the successor of which is Landmark Bank. The parent corporation of Landmark Bank is Landmark Bancshares Corporation. All affiliated corporations are wholly owned by Landmark Bancshares Corporation.

the Globe stock or the cessation of the Globe's business by reason of resulting insolvency.[2]

Landmark, beginning sometime in 1984, allegedly assisted and participated in the Gluck's fraudulent scheme through its role as sole depository of the Globe's business accounts and through performance of routine banking functions. Petitioners allege that "Landmark knew, or in the exercise of prudent business and banking practices, should have known that the Glucks were perpetrating their bad check scam..." and were looting and diverting its assets to their own benefit. It is further alleged that Landmark as agent for the Glucks knew or should have known that it would substantially assist the Glucks in committing the fraud by offering its banking facilities to the Glucks for use in the scheme, by profiting therefrom, and by taking no steps to prevent the Glucks from continuing the activities.

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[2] The Globe filed for Chapter 11 on August 19, 1985. The Order for Relief was issued on September 26, 1985. Petitioners filed the complaint on November 14, 1985.

ARGUMENT

I. The Eighth Circuit, Along With All The Other Circuits, Applies The Same "Continuity Plus Relationship" Test To The "Pattern" Element of RICO.

The Petitioners contend that the Court of Appeals failed to follow this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) where the Court discussed the meaning of the term "pattern of racketeering activity." *Id.* at 496 n.14. They also argue that the Court of Appeals' analysis is contradictory to the analysis of other courts of appeals.

In *Sedima,* the Court noted that the RICO statute requires proof that the violator conducted an enterprise through a pattern of racketeering activity. *Id.* at 496. The Court then explained that proof of a "pattern of racketeering" requires more than just the proof of two isolated unlawful acts. Instead the Court stated, because the statute was not aimed at the "isolated offender", the existence of a "pattern of racketeering activity" requires a showing of "continuity plus relationship" in the commission of the alleged predicate acts of racketeering activity. *Id.* at 496 n.14.

Since *Sedima,* nearly every court of appeals which has considered the "pattern" element has recognized that allegations of two or more predicate acts of racketeering activity, though necessary, may not be sufficient to satisfy both the "continuity" and the "relationship" prongs of the pattern requirement. Here, the Court of Appeals focused on the "continuity" prong. It held that the complaint, which alleged a single, isolated fraudulent scheme failed sufficiently to allege a "pattern" where the only predicate acts alleged — the use of the mails and wires — were components of the single scheme. In reaching this conclusion, the Court of Appeals applied the "continuity plus relationship" test suggested in *Sedima* and determined that the isolated scheme alleged did not meet the test of continuity because it was not alleged to be continuing or to have occurred previously.

The Eighth Circuit has consistently applied the "continuity plus relationship" inquiry suggested by *Sedima* with particular emphasis on the continuity prong. In line with the other circuits, the Eighth Circuit has held that allegations of a single ongoing fraudulent scheme could satisfy the continuity prong of the pattern test where the threat of continuing activity is sufficiently alleged. In *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1986), the court stated "that proof of a threat of continuing racketeering activities in the future could, in combination with ongoing acts of racketeering, be sufficient to establish a 'pattern of racketeering' ". *Id.* at 257. A pattern can also be established, the court suggested, by allegations that the defendants have "engaged in like activity in the past". *Holmberg v. Morrisette,* 800 F.2d 205, 210 (8th Cir. 1986).

The Petitioners suggest that the Eighth Circuit employs a sharply different approach from that employed by the majority of other circuits. Respondent suggests that there is no such conflict in approach and that, in any event, any distinction would make no difference in this case. The Petitioners contend that the Court of Appeals requires that a plaintiff allege different fraudulent schemes before the plaintiff can successfully allege a "pattern" of engaging in the predicate acts of mail or wire fraud. In making this argument, the Petitioners overlook the holdings of *Superior Oil* and *Holmberg* that allegations of predicate acts undertaken pursuant to a single fraudulent scheme can satisfy the "pattern" element where it is also alleged that the single fraudulent scheme is ongoing, open ended, continuous in nature, and, in particular, that it harbors a threat of continuity activity. *See, Ross v. Rice,* Fed. Sec. L. Rep. (CCH) ¶92,948 (N.D.Ala. 1986) (stating that all courts responding to this Court's invitation in *Sedima* "have uniformly held that mere allegation or proof of two or more predicate acts as part of a single scheme is insufficient if there is no demonstrated threat of continuity.") Accordingly, schemes that are distinct in purpose and necessarily finite in duration do not satisfy the "continuity" requirement.

A survey of the opinions rendered by the various circuits demonstrates that the Eighth Circuit's holdings in *Superior Oil* and *Holmberg*, rather than conflicting, are consistent with prevailing judicial attitudes.

In *Roeder v. Alfa Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987), the First Circuit held that a single fraudulent scheme might satisfy the "continuity" requirement under *Sedima* where the predicate acts "threaten to be more than an isolated occurrence" and harbor a "threat of continuing activity". *Id.* at 30-31.

Similarly, the Second Circuit holds that the plaintiff must allege commission of "at least two acts that have the purpose of furthering a continuing criminal enterprise...", *United States v. Ianniello*, 808 F.2d 184, 192 (2nd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3849 (U.S. June 23, 1987). A "continuing criminal enterprise" which has a single fraudulent purpose satisfies the continuity requirement where it exists to perpetrate a "fraud continuing indefinitely" and which has "no obvious terminating goal or date". *Id.* at 191-92. *Accord, Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2nd Cir. 1987) (holding that an alleged enterprise having "one straightforward, shortlived goal...is not sufficiently continuing to constitute an 'enterprise' "....)

The Fifth Circuit decision in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), also cited by Petitioners as a circuit opinion in conflict with the Eighth Circuit, has been sapped of all vitality in its own circuit and clearly presents no viable conflict with the Eighth Circuit.[3]

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[3] The precedential value of *R.A.G.S.* is questionable because it was decided only three months after *Sedima*, during the genesis of the post-*Sedima* review of the pattern requirement and has no analysis of "continuity" as suggested in *Sedima*.

R.A.G.S. is also unpersuasive because in two post-*R.A.G.S.* decisions, the Fifth Circuit ignored it. *See, Smoky Greenhaw Cotton Co.*

In the Seventh Circuit, the continuity element of a "pattern of racketeering" is adequately alleged where the predicate acts are sufficiently separate in time that they may be viewed as separate transactions. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1111 (7th Cir. 1987). That Circuit, however, also holds that continuity requires allegations giving "some indication of a 'threat of continuing activity' by the defendants...". *Marks, supra*, 811 F.2d at 1111.

The Fourth, Ninth and Tenth Circuits, not mentioned by Petitioners, also recognize that where one fraudulent scheme is alleged, it must also be a continuous scheme and suggest a threat of continuing activity in order to satisfy the continuity test of *Sedima*. *See, International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (stating that multiple predicate acts to perpetrate a single fraudulent scheme will not constitute a pattern of racketeering, except where a large continuous scheme is alleged); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (requiring allegations of a threat of continuing activity in order to satisfy the "continuity plus relationship" test); *Torwest DBC, Inc. v.*

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v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 785 F.2d 1274, 1280-81, n.7 (5th Cir. 1986) (expressing no opinion as to whether the Fifth Circuit would follow the lead of courts requiring a showing of two fraudulent schemes, ongoing schemes, or the threat of continuing activity); *Cowan v. Corley*, 814 F.2d 223, 226-27 (5th Cir. 1987) (deciding the pattern issue in light of *Sedima* and without reliance on *R.A.G.S.*). More recently, in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987) the court questioned whether the treatment accorded the pattern requirement in *R.A.G.S.* was binding on the Circuit. *Id.* at 425. In any event, the panel urged that *R.A.G.S.* be overturned by the Circuit, en banc, and replaced by a test which would recognize that "[a] scheme to achieve a single discrete objective does not of itself create a threat of on-going activity, even when the goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished." *Id.* at 426. (citing, *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987).

Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (holding that a "plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred" and "[a] scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when the goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished."); *Condict v. Condict,* 815 F.2d 579, 584-85 (10th Cir. 1987) (activity that is bounded in time does not constitute a "pattern").

Finally, the Eleventh Circuit in *Bank of America National Trust & Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986), also "expressly adopted the threat of continuing activity as a prerequisite to finding a pattern." *Scheftelman v. Jones,* 636 F.Supp. 263, 267 (N.D.Ga. 1986), (citing, *Touche Ross, supra,* 782 F.2d at 971).

The preceding review demonstrates that each circuit, including the Eighth Circuit, has considered and adopted the "continuity plus relationship" analysis suggested by this Court in *Sedima* and that all courts hold that the "continuity" prong also requires an allegation that where a single fraudulent scheme is alleged, it must be ongoing, include separate fraudulent transactions, and harbor a threat of continuing activity.

This Court recently denied petitions for writs of certiorari in two cases which presented the same issue as that presented here. *Holmberg v. Morrisette,* 800 F.2d 205 (8th Cir. 1986), *cert. denied,* ____ U.S. ____, 107 S.Ct. 1953 (1987); *United States v. Ianniello,* 808 F.2d 184 (2nd Cir. 1986), *cert. denied,* 55 U.S.L.W. 3849 (U.S. June 23, 1987). Interestingly, in *Ianniello,* the Solicitor General's Office was of the view that there was no conflict between the Eighth Circuit and the others on this question. Brief for the United States In Opposition at 6-8, *Ianniello, supra.* This petition raises no new questions not raised by petitioners in *Holmberg* and *Ianniello.* No different result is warranted here.

II. The Decision Below Does Not Raise A Question Of Exceptional Importance Because The Complaint Does Not Allege A Pattern Of Racketeering Under The Reasoning Applied In The Allegedly Conflicting Decisions

The fraudulent scheme alleged by Petitioners would not, under the analysis applied by any of the circuits, amount to a pattern of racketeering activity because the conduct does not satisfy the "continuity" prong of the *Sedima* test under any of the analyses applied. Thus, this case is not an appropriate vehicle for review.

The scheme alleged by Petitioners was found by the Court of Appeals to be a single scheme, because it was not open ended, ongoing or continuous. Its admittedly limited objective was to prolong only the life of the Globe beyond its actual insolvency. By definition and design, the alleged fraudulent scheme involved only the Globe and would necessarily terminate upon the Globe's sale or insolvency. The alleged scheme in fact ended before the Complaint was filed.

This isolated conduct ought not to satisfy any circuits' formulation of the "continuity" requirement because, as found by the Court below, it constituted only a single, isolated alleged scheme, which was bounded in time and scope, distinct in purpose and harbored no threat of continuing activity. Lastly, no one alleged that Respondents had engaged in similar activities in the past or that they were engaged in like activities elsewhere.

Were this other than an isolated scheme, and therefore within RICO's purview, the plaintiffs would have alleged that the Gluck's operated other businesses in like manner or that Landmark continuously pursued such unlawful acts with the Glucks or other customers. The allegations here are thus in marked contrast with the allegations in *Ianniello, supra,* which involved distinct business entities involved in nearly identical acts on a continuous basis.

The decision below was, therefore, correct under any analysis.[3]

CONCLUSION

The Petition for writ of Certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

DAVID W. HARLAN
(Counsel of Record)
THOMAS P. HOHENSTEIN
GALLOP, JOHNSON & NEUMAN
101 South Hanley Road
Suite 1600
St. Louis, Missouri 63105
(314) 862-1200

Attorney for Respondent,
Landmark St. Louis Bank

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[3] The defective allegations of pattern are but one of the fatal deficiencies in the Complaint raised by Respondents below. Petitioners allege that Landmark knew or should have known of the fraud and failed to take steps to prevent it. It is well settled that where, as here, a RICO action is premised upon alleged acts of mail or wire fraud, the plaintiff must allege and prove specific criminal intent to defraud, mere knowledge being insufficient. *See, e.g., Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 485 (5th Cir. 1986). Although this argument was not addressed or relied upon by either court below, it provides adequate independent legal grounds for affirming the dismissal of the complaint against Landmark. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20 (1979).